

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY ALLEN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

July 19, 2011

No. 297796

Kent Circuit Court

LC No. 08-013299-FC

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant Bobby Williams appeals as of right his jury conviction of three counts of armed robbery,¹ one count of first-degree home invasion,² one count of false report of a felony,³ one count of possession of a controlled substance (marijuana),⁴ and one count of carrying a firearm during the commission of a felony.⁵ The trial court sentenced Williams, as a third-offense habitual offender,⁶ to two years in prison for felony firearm, consecutive to 35 to 60 years in prison for armed robbery and home invasion, and 10 to 15 years in prison for false report of a felony. The trial court also fined Williams \$500 for the possession of marijuana. We affirm.

I. FACTS

On the evening of December 8, 2008, Katie Funk, Andrew Casali, and Lukas Gallegos were at the apartment where Casali, Gallegos, and their roommate Nathan Darling lived. An intruder with a gun entered the apartment and told Funk, Casali, and Gallegos to get on the ground. The intruder demanded that they hand over any valuables that they had. According to

¹ MCL 750.529.

² MCL 750.110a(2).

³ MCL 750.411a(1)(b).

⁴ MCL 333.7403(2)(iv).

⁵ MCL 750.227b.

⁶ MCL 769.12.

Casali and Gallegos, the intruder repeatedly threatened to kill them. While pointing a gun at Gallegos, the intruder patted him down; however, the intruder did not take anything from Gallegos because he had nothing of value on him. The intruder pointed the gun at Funk's head, and Funk gave him her student identification card and debit banking card. The intruder then went into another room, where he found and took Darling's computer and camera. When he came back into the room where Funk, Casali, and Gallegos were, the intruder then demanded Casali's valuables, and Casali gave the intruder his cell phone. Before leaving, the intruder told Funk, Casali, and Gallegos to stay on the ground and threatened to kill them if they called the police.

After the intruder left, Funk called the police. When the police arrived, the first officer at the scene, Grand Rapids Police Department Officer Gregory Rekucki, noticed footprints that came on to the porch from the east and then exited the porch to the south. So, before entering the apartment, Officer Rekucki preserved one of the footprints by putting a box over it. According to Officer Rekucki, the print looked like a boot print rather than a shoe print. The witnesses told him that the intruder was wearing all black clothing and boots.

Grand Rapids Police Department Officer Darren Geragthy arrived at the scene and used a police canine to track a set of boot prints from the crime scene to the front of Williams' sister, Latasha Elliot's, house. Officer Geragthy testified that he was able to verify that the dog was tracking the same, single set of footprints because he could see them in the snow. Officer Geragthy testified that when they got to the sidewalk in front of Elliot's house, he noticed that the prints had been disturbed: they had been covered up by another set of footprints made by a pair of Nike tennis shoes. Officer Geragthy also testified that the snow in this area appeared to have been shoveled. Officer Geragthy testified that, despite the disturbed footprints, his tracking dog took him around to the back of Elliot's house and continued up to the back door.

As police officers were about to approach Elliot's house, they received a "shots fired" call from dispatch for a location a few blocks away. However, an officer in the area where the shots were supposedly fired reported that he had heard no shots fired. The officers then approached Elliot's home. Elliot answered the door, and the officers noticed Williams behind her. The officers asked Williams to step outside, where they searched him and found marijuana, as well as Funk's student ID and debit card, and Casali's cell phone. The officers did not find a gun on Williams. The police arrested Williams for possession of marijuana and placed him in a police vehicle. Officer Geragthy also testified that he saw Williams when officers escorted him out of Elliot's house, and the shoe impressions that he made then matched the shoe impressions that had disturbed the boot prints he had been tracking.

The police then searched Elliot's house. They did not find a gun or any of articles of clothing resembling those that the intruder was allegedly wearing. However, the police found a backpack under a child's bed, which contained a laptop and camera. Darling later identified the laptop and camera as the property stolen from his room.

According to Grand Rapids Police Department Officer Frank Barthel, Williams said that the person they were looking for was Antoine Davis, who had just left. Also, Williams said that the property that the police found on his person and in the house were items that he was holding for Davis. Officer Barthel testified that Williams was wearing Nike Air Jordan shoes when he was arrested.

About 25 to 30 minutes after the robbery, police officers took Funk, Casali, Gallegos, and Darling to Elliot's house in an effort to make an identification of the intruder. At the time of the identification procedure, Williams was handcuffed, standing next to a police car with a light shone on him.

Funk testified that, before arriving at the house where she identified Williams, a police officer told her that they had tracked and found the man who robbed them and that they wanted her to identify him. Funk explained that at the time she made the identification, she and Darling were sitting in the backseat of a police car together and that Williams was about 20 feet away from her. She never got out of the police car, but was able to view Williams through the front windshield of the vehicle. She testified that Williams was wearing earrings when she identified him. Funk testified that she did not hesitate to identify Williams as the intruder; she looked at Williams for "a good 15 seconds" before she identified him and there was no question in her mind that he was the robber. Funk denied that the police or anyone else pressured, threatened, or influenced her in any way to identify Williams as the robber. Funk testified that she was certain and had no doubt that Williams was the man who robbed her.

Casali testified that before going to the show-up, the police told him and Gallegos that they were going to identify someone. But Casali denied that the police or anyone else pressured, threatened, or influenced him in any way to identify Williams as the robber. Casali also denied that the police told him that the man presented to him for identification was found in possession of the stolen items. Casali testified that at the time of the identification procedure, he and Gallegos were sitting in the back of a police car, looking at Williams through the windshield. Casali explained that the windshield was clean and that he could see "perfectly." Casali testified that he had no hesitation when he identified Williams as the intruder. According to Casali, "I knew right away that was the person I had just seen. I probably made the identification within ten seconds." There was no doubt in Casali's mind that Williams was the perpetrator.

Gallegos confirmed that at the time of the identification procedure, he and Casali were sitting in the back of a police car, looking at Williams through the windshield. Gallegos also confirmed that he identified Williams as the intruder. Gallegos testified that before arriving at the house where he identified Williams, the police told him that a canine unit had followed some tracks and that they had found someone. However, Gallegos denied that the police told him that he had to identify Williams as the intruder, and he also confirmed that he freely identified Williams. Gallegos testified that there was no doubt in his mind that Williams was the intruder.

At trial, Funk, Casali, and Gallegos identified Williams as the intruder who robbed them on December 8, 2008. Funk testified that Williams was in the apartment for a total of five minutes. According to Funk, at the time of the robbery, Williams was wearing a black, hooded sweatshirt; black pants; and tan, Timberland-style boots. She said that she "distinctly" remembered Williams' eyes and eyebrows and that he had earrings. She also remembered his nose, the shape of his lips, and the shape of his face. Casali he said that he remembered what the intruder's eyes and eyebrows looked like, and he remembered the intruder's facial structure and that he had two earrings in his ears. Casali also testified that at the time of the robbery, the intruder was wearing leather, "carpentry" boots. At the time of the robbery, Gallegos noticed that the intruder was wearing black pants, a black sweatshirt, and earrings.

Williams' sister, Elliot, testified at trial that on the evening of December 8, 2008, Williams was at her house watching her children. She returned home around 7 p.m. Williams was there for about 20 minutes, and then left to go to the store. He was gone about 20 minutes, and then returned home around 8 p.m. Elliott testified that Williams later left the house again to go give someone a haircut. According to Elliot, Williams returned home later, but she was not sure what time; however, it was before the police arrived. Elliot explained that after he came back home this time, Williams then went outside for about 15 minutes to shovel snow. Elliot testified that Williams was wearing Nike tennis shoes. Elliot testified that, to her knowledge, Williams did not own a pair of Timberland boots. She confirmed that Williams did wear stud-style earrings "[o]n occasion." Elliot testified that she was not aware of anyone, except the police, coming into her house that evening. Specifically, Elliot denied that Antoine Davis came to her home that evening.

Williams admitted to prior convictions of armed robbery and carjacking, for which he was sentenced to five years in prison when he was 15 years old. However, he denied committing the robbery in this case. He stated that, on the night in question, he was shoveling snow in front of Elliot's house when Davis approached him. Williams admitted that he purchased marijuana from Davis. During the purchase, Davis asked Williams to hold a backpack for him; but Williams did not know what the bag contained. Williams put the backpack under a bed so that Elliot's children would not get into it. Williams testified that Davis left an ID, debit card and cell phone on the porch. Williams did not know that the items were stolen, but he put them in his pocket so that he could put them in Davis' backpack. Also, he testified that he did not own or wear Timberland boots.

According to Williams, he was smoking marijuana on the front porch, when he saw the police walking around. After seeing the police, Williams made a false report of "shots fired" because he was worried about the marijuana smell attracting the police. Officer Rekucki testified that it was later confirmed that the call came from Williams' cell phone. At the time of his arrest, Williams told the police that he could give them a phone number for Davis. However, at trial, he admitted that he never again tried to convey that information to his attorney or anyone else.

As stated previously, the jury convicted Williams, and the trial court sentenced him. Williams now appeals.

II. IDENTIFICATION PROCEDURE

A. STANDARD OF REVIEW

Williams argues that the on-the-scene identification procedure was impermissibly suggestive because police indicated to the witnesses that he was in fact the intruder. Because Williams did not move to suppress the pretrial identifications, he failed to preserve the issue for

appellate review.⁷ Accordingly, our review of Williams' claim is limited to plain error affecting his substantial rights.⁸

B. LEGAL PRINCIPLES

This Court has held that “on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance.”⁹ However, identification procedures can be improperly suggestive if police inform the identifying witness that they have apprehended the right person or if police single out one person within the show-up.¹⁰ Nevertheless, as Williams concedes, “In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was *so* suggestive in light of the totality of the circumstances that it led to a *substantial likelihood of misidentification*.”¹¹ “An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process.”¹² “The fairness of an identification procedure is evaluated in light of the total circumstances.”¹³ Factors relevant to the totality of the circumstances include:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.^[14]

C. APPLYING THE PRINCIPLES

Here, the evidence shows that the on-the-scene procedure used in this case was indeed suggestive. Williams was the only suspect shown to the witnesses, and the police indicated to Funk and Gallegos that the man they were going to identify was a man that the police had tracked from the scene of the robbery.¹⁵ However, we disagree that, under the totality of the

⁷ *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987).

⁸ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁹ *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

¹⁰ *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), overruled in part on other grounds, 470 Mich 602 (2004).

¹¹ *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (emphases added).

¹² *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

¹³ *Kurylczuk*, 443 Mich at 311-312.

¹⁴ *Id.* at 306.

¹⁵ See *Anderson*, 389 Mich at 178.

circumstances, the on-the-scene procedure was so unnecessarily suggestive that it led to a substantial likelihood of misidentification.

The testimony established that the three witnesses were taken to identify Williams within 30 minutes after the robbery. The witnesses were sitting in the back of police cars at the time of the identification; however, there was nothing obstructing their views. All three witnesses testified that they could see Williams clearly, as he was standing only about 20 feet away with a light shone on him. Specifically, Funk testified that she did not hesitate to identify Williams as the intruder; she looked at Williams for “a good 15 seconds” before she identified him and there was no question in her mind that he was the robber. Similarly, Casali testified that he had no hesitation when he identified Williams as the intruder. According to Casali, “I knew right away that was the person I had just seen. I probably made the identification within ten seconds.” Further, Funk testified that, during the robbery, Williams was in the apartment for a total of five minutes. She said that she “distinctly” remembered Williams’ eyes and eyebrows and that he had earrings. She also remembered his nose, the shape of his lips, and the shape of his face. Casali similarly testified that he remembered what the intruder’s eyes and eyebrows looked like, and he remembered the intruder’s facial structure and that he had two earrings in his ears. Funk and Casali denied that the police or anyone else pressured, threatened, or influenced them in any way to identify Williams as the robber. And all three witnesses testified that they had no doubt that Williams was the intruder at the time that they identified him.

Therefore, we conclude that Williams was not denied due process because he has not shown, based on the totality of the circumstances, that the pretrial identification procedure was so suggestive that it led to a substantial likelihood of misidentification.

Williams argues that defense counsel provided him ineffective assistance of counsel when he failed move for suppression of the show-up identification testimony. However, because we find no error in the admission of the identification testimony, we conclude that defense counsel’s failure to object did not constitute ineffective assistance of counsel.¹⁶

III. PRIOR CONVICTIONS

A. STANDARD OF REVIEW

Williams argues that the trial court erred in allowing introduction of his prior convictions for robbery and carjacking because it allowed the jury to convict him based on a belief that he had a propensity to commit violent crimes. We review for an abuse of discretion a trial court’s decision to admit or exclude evidence.¹⁷

B. UNDERLYING PROCEDURAL FACTS

On the first day of trial, the prosecutor moved for permission to use for impeachment purposes evidence of Williams’ prior guilty plea to armed robbery and carjacking. The

¹⁶ See *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002).

¹⁷ *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

prosecutor argued that they both contained elements of theft or dishonesty, that they were both within the 10-year window under MRE 608 and 609, and that they were relevant to determination of Williams' credibility. Defense counsel objected, arguing that mention of the crimes to the jury would be prejudicial by indicating that Williams had a propensity to commit violent crimes. The trial court then ruled on the record as follows:

[T]his is a matter confined in the exercise of my sound discretion, and in that exercise I'm granting the motion. The court rule permits and, in my opinion, there is an instruction that the court will give which will instruct the jury as to the proper use of this information and, for that reason, I believe that affords the defendant sufficient protection and, yet, enables the jury to assess his credibility properly should he choose to take the stand.

In defense counsel's opening statement, after the close of the prosecution's case, he first brought the prior convictions to the jury's attention by stating as follows:

[O]ne thing you will also probably hear, I anticipate that the prosecution will bring to your attention the fact that when he was 15 years old, Mr. Williams did commit a robbery and one—I think a carjacking. He is now— . . . 23 or 23. In any event, that was a long time ago when he was a kid. He learned his lesson. He pled guilty to those crimes—crimes he did.

During Williams' testimony, defense counsel questioned him as follows:

Q. When you were 15 years old, did you perpetrate a robbery—an—armed robbery and a carjacking?

A. Yes, I took place in that.

Q. Okay. You were—how old were you, when this happened?

A. I was 15.

Q. And did you confess your guilt to that matter?

A. Yes, at the time I confessed my guilt. I turned myself in.

Q. You got your punishment?

A. Yes, I got—I did five years in prison at the age of 15 for that, so yes.

Q. You don't have any great desire to go back to prison, I take it?

A. No.

On cross-examination, the prosecutor briefly questioned Williams about his prior convictions:

Q. You've previously been convicted of armed robbery and carjacking, correct?

A. Yes. That was back in 2002, yes.

Q. You were sentenced in 2003; is that correct?

A. Yes.

Q. Thank you.

During closing argument, the prosecutor stated as follows:

Now, when considering the defendant's testimony, you can consider in determining whether he's to be believed or not believed whether—the credibility of it, the fact that he has two prior convictions involving crimes that had an element of theft in them, his armed robbery and his carjacking. The law deems prior offenses that have an element of theft to them to have some bearing on a person's credibility, and that's why you were allowed to hear about them, and so in assessing the defendant's credibility, whether you believe his story or not, you can consider those convictions when weighing his credibility. And, again, that's just another factor that, in our opinion, demonstrates why the defendant's story is simply unbelievable and unworthy of your consideration.

The trial court instructed the jury that attorneys' comments and arguments were not to be considered as evidence. The trial court further instructed the jury as follows:

In this case, there is some—there is evidence that the defendant has been convicted of crimes in the past. You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime in this case.

C. LEGAL PRINCIPLES

MRE 609 provides, in pertinent part, as follows:

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

* * *

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) *Determining probative value and prejudicial effect.* For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

D. APPLYING THE PRINCIPLES

Here, the trial court failed to adhere to the requirement that it articulate, on the record, its analysis of the MRE 609(b) factors when it ruled that the prosecution could present evidence of Williams' prior guilty plea to armed robbery and carjacking for impeachment purposes. The trial court merely concluded that its jury instructions would provide sufficient protection from any potential prejudice. However, we find it significant that defense counsel first mentioned the prior convictions in his opening statement and then elicited testimony regarding the convictions during direct examination of Williams, thereby initially bringing the past crimes to the jury's attention. Accordingly, because a party may not contribute to an error at trial and then use that error as an appellate parachute,¹⁸ we conclude that the deficiencies in the trial court's initial ruling were harmless.

IV. JURY INSTRUCTIONS

A. WAIVER

Williams argues that he was denied a fair trial because the trial court failed to properly instruct the jury according to CJI2d 7.8,¹⁹ regarding the jury's need to carefully scrutinize

¹⁸ *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

¹⁹ CJI2d 7.8 states in pertinent part:

(1) One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.

(2) In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender

eyewitness identification testimony. However, the trial court specifically asked trial counsel if there were any objections to the instructions as given, and defense counsel stated that he had no objections. Therefore, by expressly approving the instructions, Williams' counsel waived this issue on appeal.²⁰

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Williams argues that defense counsel was ineffective by failing to request that the trial court read CJI2d 7.8. However, no error occurs when the jury instruction actually given "fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant."²¹

In this case, the trial judge instructed the jury consistent with CJI2d 3.6, which deals with the credibility of witnesses:

As jurors, you must decide what the facts of this case are. This is your job and no one else's. You must think about all the evidence and the testimony and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said.

* * *

Since it is your job to decide which—or what the facts of the case are, you must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony. In deciding which testimony you believe, you should rely on your own sense and everyday experience.

before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at that time.

(3) Also, think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.

(4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with her identification of the defendant during trial.

(5) You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

²⁰ *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

²¹ *People v Federico*, 146 Mich App 776, 785; 381 NW2d 819 (1985).

* * *

There is really no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions. Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness? Does the witness seem to have a good memory? How did the witnesses look and act while testifying? Did the witnesses seem to be making an honest effort to tell the truth or did the witness seem to evade the questions or argue with the lawyers? Does the witness's age and maturity affect how you judge his or her testimony? Does the witness have any bias or prejudice or any personal interest in how this case is decided? Have there been any promises, threats, suggestions, or other influence that affected how the witness testified? In general, does the witness have any special reason to tell the truth or any special reason to lie? All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept. You should think about whether the disagreement involves something important or not and whether you think someone is lying or is simply mistaken. People see and hear things differently and witnesses may testify honestly but simply be wrong about what they thought they saw or remembered. It's also a good idea to think about which testimony agrees best with the other evidence in the case.

However, you may conclude that a witness deliberately lied about something that is important to how you decide a case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.

The trial court's instruction directed the jurors' attention to various factors that influenced the witnesses's perceptions and memories. These factors comport with the essence of CJI2d 7.8. Therefore, the instructions as given adequately protected Williams' rights. Indeed, we note that a reading of CJI2d 7.8(3) would have arguably hurt Williams' case. Paragraph 3 addresses the degree of confidence with which a witness made the identification, and all three witnesses here stated that they had no doubt that Williams was the man that robbed them. Therefore, we conclude that the instructions as given adequately protected Williams' rights, and defense counsel was not ineffective for failing to specifically request that the trial court read CJI2d 7.8.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens